

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1107
(Sunrise Hospital)

and

Case 28–CB–6298

SYLVIA BURNETT, an individual

Joel C. Schochet, Esq., for the General Counsel.
*Kristina L. Hillman, Esq. (Weinberg, Roger &
Rosenfeld)* of Alameda, California, for the
Respondent.

DECISION

Statement of the Case

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on December 13, 2005. The charge was filed August 18, 2005¹ and the complaint was issued on October 31 and amended on November 18. The amended complaint charges that Service Employees International Union, Local 1107 (the Union or Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by unlawfully restraining employees in the exercise of their Section 7 rights and by arbitrarily failing and refusing to process a grievance for Sylvia Burnett (Burnett or the Charging Party), a member of the bargaining unit that was represented by the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

Sunrise Hospital is a Nevada corporation with an office and place of business in Las Vegas, Nevada, and is engaged in the operation of a hospital providing inpatient and outpatient medical care. During the 12-month period ending August 18, 2005, a representative period, Sunrise Hospital (the hospital) purchased and received at its facility in Las Vegas goods valued in excess of \$5000 directly from points outside the State of Nevada. The Union admits and I find

¹ All dates are in 2005 unless otherwise indicated.

that Sunrise Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

5 II. Alleged Unfair Labor Practices

In 2003, the Union became the exclusive collective-bargaining representative of employees in the bargaining unit at the hospital. Throughout the period in this case, the Union and the hospital have maintained and enforced a collective-bargaining agreement covering
10 conditions of employment, including a grievance-arbitration procedure. Burnett is a member of the bargaining unit, and she was a member of the Union during the first year it represented the unit employees. However, she then resigned her membership, and she was not a member of the Union during the events in this case. Cheryl Bunch has been an organizer and representative for the Union since 2002. She had been a union representative in the hotel
15 industry for many years before 2002.

On May 13, Burnett, a housekeeper, entered a patient's room² to clean it. Serena Perkins, a certified nurse's aide, was present in the patient's room changing the sheets on the patient's bed while the patient, who was partially paralyzed, was seated on a chair. The next
20 day, a Saturday, Burnett was about to enter the same patient's room for the same purpose, but she was prohibited from entering by the charge nurse and was told to keep out of the patient's room.³ Burnett asked why she was prohibited from going into this room, and the charge nurse replied that she would be told on Monday. The next day, a Sunday, the charge nurse again prohibited Burnett from entering the patient's room.

On Monday, May 16, Burnett met with her supervisor, Lily Cruz, a human resources representative, and two human resources supervisors—Bob, who is the manager of the nurses' aides, and Brad, who is Bob's supervisor. Brad told Burnett that a nurse⁴ had filed a complaint alleging that Burnett had made inappropriate sexual comments and suggestions to a patient.
30 (The patient was the one whose room Burnett had been prohibited from entering on Saturday and Sunday.) Burnett protested, saying she had cleaned the patient's room numerous times, and she was just being friendly with the patient. Brad told Burnett that she was being suspended pending the completion of an investigation. Burnett was then escorted out of the facility.

On May 19, Brad called Burnett and arranged to meet with her on Friday, May 20. The meeting, which was brief, was held in the human resources office and was attended by the same persons as the previous meeting on Monday. In addition, Ed Silver, a union steward, was present. Brad told Burnett that witnesses had provided statements concerning Burnett's improper actions with the patient. Brad told Burnett that she was being discharged. Burnett
40 protested, saying she would not have engaged in flirtatious actions with someone like this patient. Burnett's protestations did not change the termination decision, and she left and went home.

45 ² For privacy purposes, the patient's identity was not revealed at the hearing. The patient is identified herein simply as "the patient."

³ Despite this order, Burnett entered the patient's room later that day. Burnett claims that she entered the room, despite the charge nurse's order, to replace the paper towels in the room. However, Burnett had already been prohibited from doing any cleaning in the patient's room, and thus, she did not likely enter the patient's room innocently or inadvertently.
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⁴ The complaint was made by Perkins, a nurse's aide.

After she arrived home, Burnett telephoned the Union's offices, and she was connected to Bunch. She told Bunch she needed help because she had been fired from her job at the hospital. Bunch asked Burnett why she had been terminated, and Burnett said it dealt with a charge of sex and sexual harassment. Bunch asked Burnett if she was given any paperwork, and Burnett replied no. Burnett said that Silver, the union steward, was present at the termination meeting. Bunch said that she would meet Burnett on Monday to prepare a grievance, and in the meantime Bunch would investigate the basis for the hospital's termination decision. Bunch asked if there were any witnesses to the alleged incident on which the hospital's decision was based, and Burnett replied no. However, Burnett's denial of any witnesses was not true because Burnett knew there was at least one witness to her actions in the patient's room—Perkins.

Burnett was not a credible witness. Her demeanor displayed resentment more than truthfulness. Bunch was more open and candid when responding to questions. Moreover, Bunch's recollection of her conversation with Burnett was more detailed than Burnett's and was consistent with subsequent events. For example, Bunch did investigate the hospital's basis for terminating Burnett, as she advised Burnett she would do.

Burnett claims that Bunch did not ask her why she was fired. This claim is not credible. Burnett had just been fired, and this was the very reason she was seeking help from Bunch. If Bunch had asked Burnett nothing else, she would likely have asked Burnett why she was fired. Indeed, it is not denied that Bunch scheduled a meeting with Burnett on Monday to prepare a grievance, and the first step in preparing a grievance is knowledge of the alleged reason for the termination. Bunch testified that she did ask Burnett why she was discharged. This testimony is credible. Burnett's denial that Bunch asked her why she was discharged further detracts from her credibility.

Burnett claims that Bunch asked her if she was a member of the Union. Bunch denies that she asked Burnett this question. Bunch's denial is credited because she was a more credible witness. Moreover, Bunch explained that she has been a union representative for many years, and she would not ask a unit member such a question because she knows the problems, viz., adverse inferences, that could be raised. The credibility of Burnett's claim is also lessened by Burnett's admission that she did not follow up on Bunch's alleged question. Burnett did not appear to be timid or unassertive. (Indeed, her assertive nature was displayed in her contact with Bunch in July.) And, if Bunch actually had asked Burnett whether she was a union member, Burnett likely would have asked Bunch what her union membership had to do with her grievance.

After Bunch's conversation with Burnett, Bunch called Silver and asked him about the matter. Silver told her he had seen the witnesses' statements, and he felt that this was not a good case to pursue. (Silver did not testify. His statement to Bunch was accepted for its effect on Bunch's decision on the grievance, not for the truth of the statement.)

Bunch then contacted the hospital's human resources section and obtained copies of the witnesses' statements. The statements were from (1) Perkins, (2) Diana Bryant,⁵ a hospital secretary who observed Burnett's actions as Bryant was walking by the patient's room, and (3) a member of the patient's family. The statements were quite harmful to any defense that could be raised on behalf of Burnett. Nevertheless, Bunch contacted the two witnesses who were hospital employees, and she spoke to these witnesses on Saturday. Both witnesses

⁵ Bryant was described by Bunch as a long-term, well-respected employee.

confirmed the accuracy of their statements. After reviewing the witnesses' statements and the evidence, Bunch determined that the hospital had shown its "due diligence" in making its decision to discharge Burnett.

5 On Monday morning, May 23, before the scheduled meeting between Bunch and Burnett, Bunch called Burnett and asked her if she knew of any witnesses who could have overheard what occurred in the patient's room or who could confirm Burnett's version of what occurred, viz., that she did not engage in inappropriate, sexually-suggestive conduct toward the patient. Burnett told Bunch that she had no such witnesses. Bunch then told Burnett that a
10 grievance would be fruitless, and she cancelled their meeting for that morning.

The collective-bargaining agreement between the Union and the hospital allows bargaining unit members to file grievances individually and without input from the Union. Bunch did not advise Burnett of this option during their discussions. However, the Union holds monthly
15 workshops in which various aspects of the agreement are discussed. In several of these workshops, the rights of unit members to individually file grievances were discussed. In addition, Burnett obtained a copy of the collective-bargaining agreement in or before June.

Upon being told by Bunch that the Union would not file a grievance to protest her
20 termination, Burnett became incensed and vituperative, and she cursed at Bunch. She also said that she knew her rights, she blamed Bunch's decision on the fact that Burnett was not a member of the Union, and she demanded that Bunch put her decision in writing. Bunch complied with that request by sending a letter to Burnett setting forth and explaining the Union's decision.
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The next time that Burnett contacted the Union was approximately July 8 when she spoke to Bunch and asked that a grievance be filed concerning a backpay issue. Bunch said to Burnett, "You're not even a member." At this time, Burnett was neither a member of the Union nor a member of the bargaining unit. Burnett did not ask Bunch to explain what she meant, and
30 Burnett did not testify concerning her understanding of Bunch's comment. Bunch explained that she made the statement because of the way Burnett had treated her when they last spoke. In any event, Bunch felt that Burnett's backpay claim lacked merit, but because of the vengeful and contemptuous manner in which Burnett had previously treated Bunch, she prepared a grievance in the presence of Burnett, which Burnett signed, and filed it with the hospital. That
35 grievance was later denied.

III. Analysis

Section 8(b)(1)(A) of the Act prohibits a union from restraining or coercing employees in
40 the exercise of the rights guaranteed by Section 7 of the Act. Section 7 guarantees employees the right to join or to refrain from joining labor organizations. Like its counterpart in Section 8(a)(1), Section 8(b)(1)(A) does not require motivation or intent to establish a violation. See *Boilermakers Local 686 (Boiler Tube)*, 267 NLRB 1056, 1057 (1983).

45 The General Counsel contends that, during their first telephone conversation, Bunch asked Burnett whether Burnett was a member of the Union, and this inquiry constituted a threat not to file a grievance because Burnett was not a union member, in violation of Section 8(b)(1)(A). I need not decide whether Bunch's alleged inquiry would constitute a violation of the Act because I do not believe that the inquiry was made. As noted above, Bunch was a more
50 credible witness than Burnett, both in testimonial demeanor and in plausibility. Bunch was convincing when she denied making the inquiry and when she explained that she would not make such an inquiry to a unit member who calls her for assistance. Moreover, Bunch admitted

that she did mention Burnett's nonmember status after Burnett asked in July about filing a grievance over a backpay issue. However, Bunch credibly explained that she did so because of the rude and vituperative manner in which Burnett had treated her after Bunch told Burnett of the decision to not pursue a grievance over Burnett's termination. Accordingly, and because the
5 factual predicate for this alleged violation of the Act has not been established, I will recommend that this portion of the amended complaint be dismissed.

A union's status as the exclusive representative of the bargaining unit members imposes on it a statutory duty to represent the interests of its members without hostility or discrimination. That statutory duty is violated when the union's representational conduct is arbitrary,
10 discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). A union violates Section 8(b)(1)(A) of the Act when, in processing contract grievances, it discriminates against unit employees who are not members of the union. *Auto Workers (Ford Motor Co.)*, 325 NLRB 530 (1998), *enfd.* 168 F.3d 509 (DC Cir. 1999). Nevertheless, "[a] wide range of reasonableness
15 must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

The General Counsel contends that "[o]nce the determination is made that Ms. Bunch asked on May 20 whether Ms. Burnett was a member, it is logical to conclude that the Union failed to file a grievance for Ms. Burnett because she was not a member; for why else would Ms. Bunch ask the question." (Posthearing Br., pp. 7–8.) Thus, the amended complaint's allegation involving the Union's decision to file a grievance is based on the same factual
20 predicate as the allegation involving the Union's coercion of employees in violation of rights guaranteed by Section 7, viz., the allegation that Bunch asked Burnett whether she was a union member during their initial telephone conversation on May 20. To decide this question, it is enough to rely on the finding that the inquiry by Bunch was not made. For this reason, I conclude that the evidence does not sufficiently establish an improper purpose, such as Burnett not being a member of the Union, in the Union's decision against filing a grievance over
25 Burnett's discharge. Accordingly, the Union did not violate Section 8(b)(1)(A) of the Act when it decided not to file a grievance.

However, there is additional evidence, which shows that even if Bunch asked Burnett about her membership status, her inquiry had no effect on Bunch's decision against filing a
35 grievance. First, Burnett does not claim that Bunch made any other threatening statements or inquiries. Indeed, she agrees that after the inquiry, Bunch agreed to meet Burnett on Monday morning to prepare a grievance, after Bunch completed her investigation. Second, Bunch did investigate the basis for Burnett's discharge. She telephoned the union steward who was present when Burnett was discharged. Next, she telephoned the human resources office, spoke
40 to the human resources representative, and obtained copies of the witnesses' statements. Then, she talked to the witnesses to Burnett's actions and determined that those witnesses confirmed their statements, statements that formed the basis for the hospital's discharge decision. Finally, on Monday morning, before her meeting with Burnett, she telephoned Burnett and asked if she had any witnesses or knew of anyone who could be a witness. Burnett said,
45 no.

Under these circumstances, Bunch did everything she could to determine the accuracy and propriety of the hospital's action. There is no allegation that the discharge decision was an inappropriate penalty,⁶ only that Burnett did not do what the witnesses claimed she did. Bunch's investigation revealed that the hospital had two witnesses to Burnett's improper actions with the patient. Bunch concluded that the hospital had done "due diligence" and that the basis for its discharge of Burnett was well founded. Nevertheless, it was only after Burnett told Bunch on Monday morning, May 23, that she knew of no other witnesses that Bunch decided, and advised Burnett, a grievance would not be filed.

Accordingly, I conclude that even if Bunch had asked Burnett about her union status on May 20, and even if such an inquiry would show that union membership was a factor in Bunch's decision on whether to file a grievance, the evidence in this case demonstrates that union membership was not a determining factor in Bunch's decision. She would have made the same decision without regard to Burnett's membership status. Accordingly, the Union did not violate Section 8(b)(1)(A) of the Act when it decided not to file a grievance over the discharge of Burnett.

For all of the foregoing reasons, I recommend the complaint be dismissed.

Conclusions of Law

1. Sunrise Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Service Employees International Union, Local 1107 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has not engaged in unfair labor practices as alleged in the amended complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The complaint is dismissed.

Dated: Washington, D.C. February 16, 2006

Joseph Gontram
Administrative Law Judge

⁶ After all, the witnesses reported that Burnett had made sexually suggestive actions to and in front of a partially paralyzed patient.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.